A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness

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You shall impose the penalty of death if you find that aggravating circumstances in this case outweigh any mitigating circumstances.[1]

Although there is great variation among states,[2] the factfinder in death penalty cases is typically faced with the task of weighing aggravating and mitigating circumstances. Death is usually authorized if aggravating circumstances outweigh mitigating circumstances.[3] What happens if the jury or judge believes that aggravating circumstances somewhat outweigh mitigating circumstances? Must the factfinder be convinced merely by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt? Most statutes contain no specified standard of proof.[4] By default, the standard is one of preponderance. Why is the standard not "beyond a reasonable doubt" when the decision is so momentous and final? This article looks at the constitutional implications of the standard of proof in the penalty phase of capital cases.[5]

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1. The instruction is based on the language of many statutes, in particular the description of the Pennsylvania statute in Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990).

2. *See infra* notes 82-170 and accompanying text for a discussion of varying standards.

3. *See, e.g.*, ALA. CODE § 13A-5-46(e)(3) (1982); ARK. STAT. ANN. § 5-4-603(a)(2) (1987); CAL. PENAL CODE § 190.3 (West 1988); N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1989); OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1987).

4. *See infra* text accompanying note 144.

5. This article was written prior to the United States Supreme Court's decision in Walton v. Arizona, 110 S. Ct. 3047 (1990). An underlying premise of this article was that the Court would, in all likelihood, decide that the State must bear the burden of persuasion on the issue of the appropriateness of the death penalty. Therefore, the standard of proof imposed would be one the state would have to meet. A plurality of the Court in *Walton*, however, upheld the Arizona statutory scheme which requires the defendant to prove by a preponderance that there are "mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 3050. The plurality found Arizona's provision to be constitutional under both the eighth and fourteenth amendments. Justice Scalia, who provided the fifth vote to affirm the Arizona court's imposition of death, concurred in the judgment only on this issue. *Id.* at 3059. Justice Scalia's position that there was no constitutional violation was based on his rejection of eighth amendment precedent. He did not address an independent fourteenth amendment issue. *Id.* at 3068.

This article is implicitly criticizing the plurality's decision in *Walton*. To place the burden on the defendant to prove that there are mitigating circumstances sufficient to outweigh the aggravating circumstance(s) effectively presumes that death is the appropriate penalty. The plurality accepts this in part by contrasting the penalty phase with the guilt phase where the state bears the burden of proving the elements of the crime. The distinction is a false one, however. The burden of proving the elements of the crime is on the state because the state is the moving party, seeking to deprive a citizen of liberty, and because of the severe nature of the result sought, loss of liberty, in the penalty phase, the state is the moving party, seeking to execute a citizen. Moreoever, the nature of the result, death, is most certainly as consequential as a loss of liberty.

The penalty phase is not like an ordinary sentencing where there is purely a judgmental decision being made. The penalty phase involves a more defined decision, typically that aggravating circumstances outweigh mitigating circumstances. In an ordinary sentencing, the judge is simply determining the ultimate issue, the term of years or probation and its conditions. A capital penalty phase, on the other hand, requires a preliminary *finding* regarding the aggravating and mitigating factors, which is much more like a trial decision. In addition, the penalty phase in a capital case is set up like a trial, a separate evidentiary proceeding where the factfinder must be persuaded. This, too, distinguishes the penalty phase from an ordinary sentencing proceeding.

The standard of proof in the penalty phase raises constitutional issues under both the cruel and unusual punishment clause of the eighth amendment[6] and the due process clause of the fourteenth amendment.[7] This article first analyzes death penalty cases decided by the United States Supreme Court on eighth amendment grounds. This eighth amendment section concludes that the Court is unlikely to require a heightened standard of proof under an eighth amendment rationale. The next section turns to the Court's capital cases which have raised independent fourteenth amendment issues, establishing the applicability of the due process clause to death penalty proceedings. The article then reviews the Court's noncapital cases on appropriate standards of proof in civil and criminal cases pursuant to due process requirements. This due process section sets forth the theoretical justifications for requiring a heightened standard of proof as a matter of due process. States which have specifically adopted or rejected a beyond a reasonable doubt standard in the penalty phase of capital cases are next identified and the constitutional grounds for their decisions discussed. In the final section, the article proposes that a beyond a reasonable doubt standard should be required in the penalty phase decision under a due process analysis.

I. EIGHTH AMENDMENT DEATH PENALTY CASES

In 1972 the Supreme Court effectively struck down all death penalty statutes in the United States when it decided three cases consolidated as *Furman v. Georgia*.[8] Although two justices viewed capital punishment as per se unconstitutional as cruel and unusual punishment under the eighth amendment,[9] the other three justices who voted to reverse the death sentences focused on the arbitrary imposition of the death penalty as violative of the eighth amendment.[10] Conse-

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Further, the plurality in *Walton* makes a flawed analogy to the due process decisions which found it constitutional to place the burden of persuasion on the defendant to prove affirmative defenses. The decision in the penalty phase is distinguishable from affirmative defenses. Placing the burden on the defendant to prove an affirmative defense is constitutional because the state is not relieved from proving the elements of the crime. In the penalty phase, however, the equivalent of the elements of the crime is the determination that aggravating circumstances outweigh mitigating circumstances. Requiring the defendant to prove mitigation sufficient to outweigh aggravation is comparable to requiring the defendant to disprove the heart of the crime, such as there is no dead person or he did not intend to kill the victim in a murder prosecution.

It remains to be seen what impact *Walton* will have on death penalty statutes. It may well be that, in the future, the primary avenue of challenge to death penalty statutes on burdens of proof and standards of proof will have to be through state constitutional provisions. In that case, the arguments in this article could be advanced as the proper interpretation of a state due process provision.

6. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

7. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

8. 408 U.S. 238 (1972). As Justice Marshall stated: "[N]ot only does [this decision] involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution." *Id.* at 316 (Marshall, J., concurring).

9. Justices Brennan and Marshall wrote lengthy opinions explaining why the death penalty should be held unconstitutional in today's world. *Id.* at 257-306 (Brennan, J., concurring); *Id.* at 314-74 (Marshall, J., concurring).

10. *Id.* at 253 (Douglas, J., concurring) ("uncontrolled discretion" of the factfinder); *Id.* at 310 (Stewart, J., concurring) (death penalty "so wantonly and so freakishly imposed"); *Id.* at 313 (White, J., concurring) ("no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

quently, the door was left open for states to adopt death penalty statutes that avoided the arbitrariness condemned in *Furman.*

In 1976 the Supreme Court affirmed three death sentences in *Gregg v. Georgia,*[11] *Jurek v. Texas,*[12] and *Proffitt v. Florida.*[13] The significance was to give the Court's imprimatur to the three death penalty statutes involved from Georgia, Texas, and Florida, which provide the foundation for current death penalty schemes. The basic requirements gleaned from these cases appeared to be:[14] 1) a bifurcated proceeding where the penalty was considered separately from the guilt of the defendant;[15] 2) specific standards that narrowed the class of death-eligible defendants;[16] 3) the consideration of all relevant information, especially mitigating circumstances, in the penalty phase;[17] and 4) meaningful appellate review.[18] The Court, however, tolerated great variation. The Texas statute, for example, included specific standards that narrowed the death-eligible group. Since these standards appeared in the statute's definition of capital murder,[19] the factfinder considered those factors in the guilt phase of trial. Georgia and Florida made those "aggravating" factors a finding in the penalty phase.[20] In the penalty phase, the Georgia and Florida statutes required the factfinder to consider aggravating and mitigating circumstances in deciding on life or death.[21] The Texas statute, still unusual today, required the factfinder to answer three questions affirmatively in order to impose the death penalty.[22] In Florida, a jury verdict of life or death was merely advisory to the judge who

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11. 428 U.S. 153 (1976).

12. 428 U.S. 262 (1976).

13. 428 U.S. 242 (1976).

14. Because the Court affirmed the death sentences, there is nothing in the three opinions that sets forth a court-ordered requirement for a capital statute. In the course of affirming the sentences, however, the Court emphasized the aspects of the statutes discussed in the text. For an extensive discussion of *Gregg*, see Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 318-22.

15. *Gregg*, 428 U.S. at 195; *Proffitt*, 428 U.S. at 248.

16. *Gregg*, 428 U.S. at 195; *Proffitt*, 428 U.S. at 248.

17. *Gregg*, 428 U.S. at 195; *Jurek*, 428 U.S. at 276; *Proffitt*, 428 U.S. at 250 n.8. The Court has repeatedly emphasized the importance of admitting any evidence that could conceivably mitigate. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (evidence of defendant's accomplice status and lack of intent to kill); Eddings v. Oklahoma, 455 U.S. 104 (1982) (defendant's troubled childhood); Skipper v. South Carolina, 476 U.S. 1 (1986). In the same vein, the Court recently held that North Carolina could not limit the jury's consideration of mitigating evidence to instances where they *unanimously* found a particular mitigating factor. McKoy v. North Carolina, 110 S.Ct. 1227 (1990). The Court seems dedicated to permitting any and all mitigating evidence in the penalty phase.

18. *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 253.

19. *Jurek*, 428 U.S. at 268.

20. *Gregg*, 428 U.S. at 165 n.9 & 197; *Proffitt*, 428 U.S. at 248.

21. *Gregg*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248. The Florida statute expressly requires a weighing of factors: whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." FLA. STAT. ANN. § 921.141(3)(b) (West 1985). The Georgia statute, on the other hand, does not require a "weighing." The factfinder, however, is to consider all mitigating and aggravating evidence in assessing a penalty. *See* Zant v. Stephens, 462 U.S. 862, 865 n.1 (1983) (quoting GA. CODE ANN. § 27-2534.1(b) (1978)).

22. *Jurek*, 428 U.S. at 269 (quoting TEX. CODE CRIM. PROC. ANN., art. 37.071(b) (Vernon Supp. 1975-76)):

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
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> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

made the actual determination.[23] In Georgia and Texas, the jury's decision was determinative.[24]

In the course of affirming the three death sentences, the Court rejected several specific challenges to the statutes. The Court also expressly declined to consider whether the statutes were constitutional in authorizing death for crimes other than murder.[25] Most of the rejected arguments centered on the discretion involved at various points in the capital process. There were arguments that the penalty decision still involved too much unfettered discretion as to who would receive the death penalty because, for instance: 1) the charging decision was uncontrolled as to when the death penalty was sought;[26] 2) some juries might foreclose consideration of death by finding a lesser included offense in the guilt phase;[27] 3) life imprisonment might be imposed arbitrarily because of a commutation or a jury's uncontrolled grant of mercy;[28] and 4) certain aggravating circumstances were too broad or vague.[29] It was also argued that questions put to the jury, such as the Texas question of whether a defendant was likely to be dangerous in the future and the Florida issue of whether a defendant's participation in a crime was "relatively minor," were beyond the capacity of jurors to decide.[30] There was also apparently an argument in *Proffitt* that a factfinder could consider a nonstatutory aggravating circumstance. The

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23. *Proffitt*, 428 U.S. at 249.

24. *See Gregg*, 428 U.S. at 197-98; *Jurek*, 428 U.S. at 269 (jury operates same as jury in guilt phase determination).

25. The Georgia statute provided for the death penalty for "murder, kidnaping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking." *Gregg*, 428 U.S. at 162-63 (footnote omitted) (quoting GA. CODE ANN. § 26-1101 (1972)).

The Florida statute provided for the death penalty for murder and for a sexual battery on a child under 12. *Proffitt*, 428 U.S. at 247 n.4 (quoting FLA. STAT. ANN. § 782.09(1) (Supp. 1976-77)).

The Court subsequently struck down the death penalty for rape in Coker v. Georgia, 433 U.S. 584 (1977), but there is still an open issue for serious felonies such as aircraft hijacking.

26. *Gregg*, 428 U.S. at 199; *Jurek*, 428 U.S. at 274; *Proffitt*, 428 U.S. at 254.

27. *Gregg*, 428 U.S. at 199; *Proffitt*, 428 U.S. at 254.

28. *Gregg*, 428 U.S. at 199; *Jurek*, 428 U.S. at 274; *Proffitt*, 428 U.S. at 254.

29. The Georgia statute was challenged on the basis of one of its aggravating factors which authorizes the death penalty for a murder that was " 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' " This was argued to be vague and overbroad because any murder could conceivably be categorized under this description. *Gregg*, 428 U.S. at 201. The Supreme Court declined to strike down the factor on its face, instead suggesting that the Georgia Supreme Court could interpret the provision in a constitutional manner. *Id.*

However, in Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court subsequently held that the Georgia court had failed to interpret the "wantonly vile" circumstance in a constitutionally narrow manner.

The Supreme Court, in *Gregg*, did find that two other aggravating circumstances had been interpreted in a constitutional manner by the Georgia court. Those involved a " 'substantial history of serious assaultive criminal convictions' " and a " 'great risk of death to more than one person.' " *Gregg*, 428 U.S. at 202.

Florida's statute was challenged on the basis of two similar aggravating circumstances. One paralleled the "wantonly vile" provision in Georgia, although using language of " 'especially heinous, atrocious, or cruel.' " The other tracked the Georgia provision on creating a risk to many people. *Proffitt*, 428 U.S. at 255. Again, the Supreme Court deferred to the narrrowing construction placed on these provisions by the Florida court. *Id.* at 255-56.

30. The challenge to the Texas statute focused on the second question, which asks for a determination of future criminal behavior. The Court rejected this challenge, stating that such a determination is made in setting bail and in ordinary sentencing decisions. *Jurek*, 428 U.S. 274-76.

The challenge to the Florida statute also mentioned issues such as whether the defendant acted " 'under the influence of extreme mental or emotional disturbance,' " and whether the defendant had an impaired capacity " 'to conform his conduct to the requirements of law.' " *Proffitt*, 428 U.S. at 257. Regarding each issue, the Court

Court clearly indicated its disapproval of the use of nonstatutory aggravating circumstances in footnotes but also indicated that it was unlikely that a nonstatutory aggravating circumstance could suffice under the Florida statute.[31] Another issue rejected by the Court was that there was too little guidance due to the lack of assigned weight given to aggravating and mitigating circumstances in the weighing process.[32] Standards of proof in the penalty phase were neither raised as an issue by the litigants nor discussed by the Court. The Court noted in passing that the Georgia statute required that an aggravating circumstance be proved beyond a reasonable doubt.[33] The Court also noted that the Texas statute required that the three penalty phase questions be answered affirmatively beyond a reasonable doubt.[34] The Court did not comment on Florida's lack of a statutory standard of proof even concerning the aggravating circumstances.[35]

Many issues not litigated in *Gregg*, *Jurek*, and *Proffitt* were raised in subsequent years. The Court consistently reaffirmed the basic procedural structure of the Georgia, Texas, and Florida statutes. For example, the use of an advisory jury in Florida was upheld against a sixth amendment challenge.[36] Also, despite the limited language of the three questions in the penalty phase under the Texas statute, which on their face would not appear to include many mitigating factors, the Court interpreted the questions to permit all relevant mitigating evidence as constitutionally required.[37]

Some challenges to the Georgia and Florida statutes were sustained, however. The Court found it was unconstitutional to impose the death penalty for rape as authorized in the Georgia statute.[38] The Georgia statute, as applied in a particular case, also unconstitutionally imposed the death penalty on the basis of the aggravating circumstance of a "wantonly vile" crime because of the statute's vagueness in describing "wantonly vile."[39] The Florida death penalty statute, as applied in a particular case, unconstitutionally prohibited the considera-

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indicated, as in *Jurek*, that juries make such determinations in ordinary lawsuits when evaluating such defenses as insanity. *Id.* at 257-58.

31. The Court noted that it was uncertain whether the Florida court would permit a death sentence based on a nonstatutory aggravating circumstance, *Proffitt*, 428 U.S. at 250 n.8, but twice explained why it was unlikely. One reason was the statutory language limiting the aggravating circumstances to those specified. *Id.* The other reason was that in a capital case based on a nonstatutory aggravating circumstance, the Florida court had "recast" them as statutory factors. *Id.* at 256 n.14.

32. *Id.* at 257. The argument was that a jury would not know how to weigh something like "age" or a "significant" history of criminal conduct and, therefore, a great deal of discretion and arbitrariness would invade the sentencing decision. The Court answered that these decisions were no different from other decisions made by juries and that *Furman* was satisfied by describing the factors to be considered to the jury. *Id.* at 257-58.

33. *Gregg*, 428 U.S. at 196-97.

34. *Jurek*, 428 U.S. at 269.

35. *See* statute quoted in *Proffitt*, 428 U.S. at 247 n.4. The Court focused only on the consideration of aggravating and mitigating circumstances. Although no statutory provision requires proof of aggravating circumstances beyond a reasonable doubt, this standard of proof is required by Florida case law. *See* State v. Dixon, 283 So. 2d 19 (Fla. 1973), *cert. denied*, Hunter v. Florida, 416 U.S. 943 (1974).

36. Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989).

37. *See* Franklin v. Lynaugh, 487 U.S. 164 (1988).

38. Coker v. Georgia, 433 U.S. 584, 598 (1977).

39. Godfrey v. Georgia, 446 U.S. 420, 432 (1980). The Court found that the Georgia court had failed to adequately interpret the aggravating factor to narrow its construction. *Id.*

tion of nonstatutory mitigating circumstances.[40] Florida was also barred from executing a defendant who was an accomplice to a felony which resulted in a death, but who did "not himself kill, attempt to kill, or intend that a killing take place. . . ,"[41] and from executing a defendant who is presently insane.[42]

Two of the issues challenging the Georgia and Florida statutes were raised in 1976, but not decided. In *Gregg*, the Court expressly declined to consider whether the Constitution permitted the death penalty for crimes other than murder, such as rape.[43] On the issue of whether the "wantonly vile" provision of the Georgia statute was unconstitutionally vague,[44] the *Gregg* Court expressed a desire to give the state court a chance to narrow the interpretation of the terms.[45]

The other three issues sustained by the Court, which challenged the Georgia and Florida statutes, were not raised in 1976. It is consistent with the postponement of the rape issue, however, for the Court to have waited for the issues of a defendant who did not kill or who is presently insane, on the grounds that the facts of the 1976 cases did not present these issues. In contrast, the Florida statute, on its face, presented the issue in 1976 of whether the state could limit mitigating circumstances to those enumerated.[46] It is unclear how the Supreme Court viewed the issue of limiting mitigating factors in *Proffitt*. The Court refers in a footnote to the lack of "limiting" language regarding mitigating factors compared with the aggravating circumstances,[47] which would imply that nonstatutory mitigating circumstances were permissible. In the text of the opinion, however, the Court states approvingly that the judge must "weigh eight aggravating factors against *seven mitigating factors*" to decide the penalty.[48] This language certainly implies a limitation to the statutory factors.

If the Court modified its original decision in *Proffitt* to require all nonstatutory mitigating factors to be considered, in general the Court has steadfastly refused to modify the basic procedural structure and content approved in the three 1976 cases.[49] For example, in *Zant v. Stephens*,[50] the Court refused to find that the unstructured Georgia penalty phase proceedings violated the man-

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40. Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987). Even though Florida case law appeared to have interpreted the statute to permit nonstatutory mitigating circumstances, they were not considered in the instant case. *Id.*

41. Enmund v. Florida, 458 U.S. 782, 797 (1982).

42. Ford v. Wainwright, 477 U.S. 399, 410 (1986).

43. *See supra* text accompanying note 25.

44. *See supra* note 29.

45. *Id.*

46. The language of the Florida statute is quoted in *Proffitt*. *Proffitt*, 428 U.S. at 248 n.6 (quoting FLA. STAT. ANN. § 921.141(6) (Supp. 1976-77)). The "as enumerated" language was eventually deleted by amending the statute. *See* Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987).

47. *Proffitt*, 428 U.S. at 250 n.8. The implications of this footnote are unclear. The Court is not focusing on the mitigating factors in this footnote; the focus is on the unlikelihood that nonstatutory aggravating factors could be considered.

48. *Id.* at 251 (emphasis added).

49. Besides the two examples in the text, another example is the Court's reliance on the Texas statutory factor of "future dangerousness" in deciding the constitutionality of California's "Briggs Instruction." California v. Ramos, 463 U.S. 992 (1983). The Briggs Instruction informed the jury of the potential of a commutation of a death sentence by the governor. The Court viewed the possibility of commutation as important to the jury's decision whether the defendant was too dangerous to ever "return to society." *Id.* at 1003. By finding the Briggs

date of *Furman*.[51] In the Court's view, *Gregg* was determinative.[52] The Court had approved the Georgia procedure as adequately narrowing the class of death-eligible defendants in 1976.[53] The lack of specific standards to instruct the factfinder how to consider aggravating and mitigating evidence would not now be deemed a constitutional flaw.[54] Similarly, in *Pulley v. Harris*,[55] the Court refused to require an appellate proportionality review as a constitutional mandate.[56] Although a proportionality review was statutorily required in the Georgia statute in *Gregg*, neither the Florida statute in *Proffitt* nor the Texas statute in *Jurek* had such a requirement.[57] Consequently, the Court found that a proportionality review could not be a constitutional requirement since the Florida and Texas statutes were held to meet eighth amendment scrutiny without it.[58] The Georgia, Texas, and Florida statutes thus are models against which other death penalty statutes are judged. It is unlikely that the Court will find a procedural requirement, which is lacking in the Georgia, Texas, and Florida statutes, to be constitutionally required under the eighth amendment, even though the argument was not raised in 1976.

The eighth amendment is not the exclusive route, however, for reviewing death penalty issues. As in any trial, capital cases may involve other constitutional provisions. For example, there may be issues involving the sixth amendment effective assistance of counsel, fourth amendment search and seizure, and fifth amendment self-incrimination claims. In addition, the due process clause of the fourteenth amendment can be independently invoked in criminal cases for such issues as the right to counsel on appeal,[59] the fairness of pretrial identification procedures,[60] who bears the burden of persuasion,[61] and the appropriate standard of proof.[62] The next section focuses on the due process clause in Supreme Court death penalty cases and is followed by a section on the Court's cases specifically on standards of proof.

Instruction analogous to the Texas "future dangerousness" determination, the Court found the instruction's constitutionality a foregone conclusion since the Texas statute survived constitutional attack. *Id.*

50. 462 U.S. 862 (1983).

51. *Id.* at 879.

52. *Id.* at 875.

53. *Id.*

54. *Id.*

55. 465 U.S. 37 (1984).

56. *Id.* at 50-51.

57. *Id.* at 46-51. The Court noted that the Florida courts had judicially required a proportionality review despite the absence of a statutory mandate. *Id.* at 46 n.8. The Court emphasized, however, that the Texas procedure was devoid of a proportionality review and, yet, was constitutional. *Id.* at 48.

58. *Id.* at 48.

59. Douglas v. California, 372 U.S. 353 (1963).

60. Manson v. Brathwaite, 432 U.S. 98 (1977).

61. Martin v. Ohio, 480 U.S. 228 (1987) (burden of persuasion to prove self-defense constitutionally placed on defendant); Patterson v. New York, 432 U.S. 197 (1977) (burden of persuasion to prove extreme emotional distress as defense to murder constitutionally placed on defendant).

62. *See infra* notes 83-93 and accompanying text.

II. Due Process Death Penalty Cases

The requirements distilled from the 1976 death penalty cases, decided under the eighth amendment, were largely procedural. The due process clause, rather than the cruel and unusual punishment clause, might have been at least an equally logical choice for constitutional procedural guarantees. Possibly the Court pursued restrictions on the death penalty through eighth amendment analysis because, one year prior to *Furman*, the Court handed down *McGautha v. California*.[63] *McGautha* held that the failure to guide the jury's discretion on life or death did not violate the due process clause of the fourteenth amendment.[64] However, *McGautha* is relegated to a meaningless status in subsequent cases. In *Furman*, *McGautha* is both distinguished on the ground that *McGautha* was based on the fourteenth instead of the eighth amendment[65] and outright repudiated.[66] In *Gregg*, the Court essentially limited *McGautha* to its facts, without future import, because the assumption in *McGautha* that standards could not be developed to guide the jury in the penalty phase was no longer valid.[67] Nevertheless, the Court largely developed standards for death penalty proceedings through an eighth amendment rationale. The reliance on the eighth amendment, however, does not preclude due process constraints on the penalty process.[68]

The Supreme Court has applied the due process clause to the penalty phase post-*Furman*. Although a plurality opinion, in *Gardner v. Florida*,[69] the Court held that denying the defendant access to information in a presentence report violated his due process right to an "opportunity to deny or explain" the facts in the report.[70] In another case, the Court held that the exclusion of defense evidence in the penalty phase pursuant to a state evidentiary rule violated the due

63. 402 U.S. 183 (1971). For an excellent discussion of *McGautha*, see Weisberg, *supra* note 14, at 308-14.

64. 402 U.S. at 196.

65. *Furman*, 408 U.S. at 310 n.12 (Stewart, J., concurring) (*McGautha* limited to due process and equal protection).

66. *Id.* at 248 n.11 (Douglas, J., concurring) (if eighth amendment renders arbitrary imposition of death penalty unconstitutional, then it must be unconstitutional under the due process clause as well); *Id.* at 295 (Brennan, J., concurring) (acknowledges *McGautha*, but dismisses it without much discussion); *Id.* at 329 n.36 (Marshall, J., concurring) (dismisses *McGautha* and focuses on eighth amendment theory).

67. *Gregg*, 428 U.S. at 195 n.47. *See also* Penry v. Lynaugh, 832 F.2d 915, 931 n.* (5th Cir. 1987) (Garwood, J., concurring), *rev'd on other grounds*, 492 U.S. 302 (1989) (*McGautha* rendered a "dead letter" by *Furman* and *Gregg*).

68. See, *e.g.*, Note, *A Procedural Due Process Argument for Proportionality Review in Capital Sentencing*, 21 Colum. J.L. and Soc. Probs. 385 (1988), for an argument that the due process clause should require a proportionality review, even though such review is not required under the eighth amendment.

69. 430 U.S. 349 (1977).

70. *Id.* at 362.

process clause.[71] There are, thus, due process constraints in the sentencing as well as the guilt phase of a capital case.[72]

Moreover, the Court has treated the due process issues as independent and distinct from cruel and unusual punishment issues in capital cases. Several cases illustrate the distinct focus under each amendment. In a recent case, the Court rejected eighth and fourteenth amendment[73] arguments that a capital defendant in Mississippi has a constitutional right to a trial jury decision on the weighing of aggravating and mitigating circumstances.[74] The fourteenth amendment analysis centered on whether the defendant was being deprived of his liberty without due process of law if state law guaranteed a jury decision for a death sentence.[75] In contrast, the focus of the eighth amendment issue was on the content of the sentencing decision. The defendant argued that an appellate court could not adequately consider the mitigating evidence presented at trial.[76] In another case, the Court distinguished a fourteenth amendment vagueness challenge based on lack of notice from an eighth amendment vagueness challenge based on giving the factfinder too much discretion to yield a nonarbitrary punishment.[77] Another related example is the Court's analysis of the issues on the execution of an insane defendant.[78] Executing an insane person constitutes cruel and unusual punishment because it offends the "fundamental human dignity that the Amendment protects."[79] The procedures in the particular state also violated due process because the defendant was denied an opportunity to be

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71. Green v. Georgia, 442 U.S. 95 (1979). For a lengthier discussion of *Gardner* and *Green*, see Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 354-56 (1984). *See also* Presnell v. Georgia, 439 U.S. 14 (1978), where, in a per curiam opinion, the Court found a due process violation where it was not clear that the jury had found the aggravating circumstance to exist which formed the basis for the capital sentence. Subsequent to the article, the Court decided Cabana v. Bullock, 474 U.S. 376 (1986), where the Court noted that *Presnell* was essentially overruled to the extent the decision relied upon an assumption that the jury was constitutionally required to find the aggravating factor rather than an appellate court. *Id.* at 387-88 n.4. Even though the particular application of the due process clause to the penalty phase is no longer valid, because of an assumption about the role of the jury, *Presnell* is another instance where the Court turned to the due process clause. The difficulty is in knowing how closely the penalty phase is analogous to a trial. *See infra* text accompanying notes 181-88.

72. Courts have relied upon the capital cases as authority for applying the due process clause in noncapital sentencing proceedings as well. *See, e.g.*, United States v. Brady, 895 F.2d 538, 541 (9th Cir. 1990); United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989); United States v. Sunrhodes, 831 F.2d 1537, 1541 (10th Cir. 1987).

73. The Court also rejected a sixth amendment claim to a right to a jury trial in the penalty phase on the basis of Spaziano v. Florida, 468 U.S. 447 (1984).

74. Clemons v. Mississippi, 110 S. Ct. 1441 (1990). The Mississippi Supreme Court held that, if an aggravating factor considered by the trial jury (that the crime was "especially heinous") was constitutionally invalid, the death sentence was still valid on the basis of another aggravating factor (pecuniary gain). The court found that aggravating circumstances still outweighed mitigating circumstances. The United States Supreme Court held it was constitutional for an appellate court to reweigh aggravating and mitigating circumstances when the aggravating circumstance considered by the trial jury is no longer valid.

75. *Id.* at 1447. The Court found state law had not been interpreted to create an absolute guarantee of a jury.

76. *Id.* at 1448. The Court rejected this argument and found that the appellate reweighing would satisfy the eighth amendment.

77. Maynard v. Cartwright, 486 U.S. 356 (1988). The Court held that Oklahoma's aggravating circumstance of "especially heinous, atrocious, or cruel" was unconstitutional under the eighth amendment.

78. Ford v. Wainwright, 477 U.S. 399 (1986).

79. *Id.* at 406.

heard.[80] The due process clause thus retains its own life as an independent constitutional command in the penalty phase of a capital case.

The applicability of the due process clause is only the beginning point, however. As the Court has stated, "[T]he question remains what process is due. . . ."[81] One aspect of due process is the standard of proof utilized. The next section discusses the development of the Supreme Court's cases on the due process constraint of an appropriate standard of proof. Issues involving standards of proof have not been addressed in the Supreme Court's capital cases. Therefore, the next section reviews the Court's noncapital cases on standards of proof to lay a foundation for a discussion of the lower court cases which have faced the issue of an appropriate standard of proof in the penalty phase of a capital case.

III. Due Process Cases on Standards of Proof

The United States Supreme Court has addressed standards of proof in several important noncapital cases. In determining an appropriate standard of proof, the Court's analysis focused on risks of error and the symbolic effect.[82] These cases did not involve the issue whether there should be a standard of proof. Instead, the issue was the constitutionality under due process scrutiny of the standard used. Thus, the cases do not directly provide guidance on the threshold issue in the penalty phase of capital cases of whether a standard of proof is needed. However, the cases do define the function of a standard of proof which is critical to an analysis whether a standard of proof is appropriate in the penalty phase and, if so, what the standard should be.

In re Winship[83] is the Court's major statement on standards of proof in criminal cases. The Court held that a state must prove juvenile delinquency, where the delinquency is determined by the commission of what would be a crime under adult standards, beyond a reasonable doubt.[84] The due process clause was held to protect juveniles in that situation to the same extent as adults charged with crime.[85] The long history of the beyond a reasonable doubt standard in criminal cases was discussed as indicative that the standard is basic to our concept of due process.[86] The beyond a reasonable doubt standard reduces the chance of convicting an innocent person.[87] The use of the highest standard reflects society's unwillingness to tolerate an erroneous decision on the particu-

80. *Id.* at 413.

81. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

82. *See* Santosky v. Kramer, 455 U.S. 745, 764 (1982) ("raising the standard of proof would have both practical and symbolic consequences").

83. 397 U.S. 358 (1970).

84. *Id.* at 368.

85. *Id.*

86. *Id.* at 361-62.

87. *Id.* at 363. *See also id.* at 372 (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

lar issue (here guilt of a crime).[88] As Justice Harlan stated in his concurrence, "[T]he choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of [erroneous decisions for each side]."[89] Thus, in a criminal case, the beyond a reasonable doubt standard indicates a greater social disutility in convicting an innocent person than in acquitting a guilty person.[90] The interests of the criminally accused in loss of liberty and stigma of conviction are assessed as being much greater than society's interest.[91] In addition to the risk of error analysis, the Court noted that the high standard conveys to the trier the "degree of confidence" needed to render a decision.[92] The Court expressed concern that the "moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[93]

In subsequent cases,[94] the Court emphasized both the risk of error and the symbolic effect of a standard of proof when requiring a heightened standard of proof.[95] The Court found that a clear and convincing standard was constitutionally necessary after balancing the interests in risking error in involuntary civil commitment[96] and termination of parental rights.[97] In the civil commitment and parental rights cases, the individual's interest was of such magnitude that the Court found there was a need to reduce the risk of an erroneous decision in favor of the government.[98] The Court also found that a higher standard of proof was of symbolic significance in representing society's value in the individual's interest in liberty and parental rights.[99] The significance of these interests is conveyed to the factfinder through instructions on the standard of proof.[100]

In contrast, where the nature of the interest or the impact of the decision is

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88. *Id.* at 363. *See also id.* at 370-71 (Harlan, J., concurring).

The Court refined its *Winship* analysis in subsequent cases involving affirmative defenses. In particular, in Patterson v. New York, 432 U.S. 197 (1977), the Court essentially limited the requirement of a beyond a reasonable doubt standard to statutorily defined elements of a crime. The Court held it was constitutional to place the burden of persuasion on the defendant to prove an affirmative defense that did not negate an element of the crime. *Id.* at 206-07.

89. *Winship*, 397 U.S. at 371.

90. *Id.* at 372.

91. *Id.* at 363-64.

92. *Id.* at 364.

93. *Id.*

94. *See also* Colorado v. New Mexico, 467 U.S. 310 (1984) (clear and convincing standard required in case involving the diversion of interstate water). The Court viewed the potential harm from diversion of water and the need for "stability in property rights and in putting resources to their most efficient uses" as strong interests which compelled the state proposing to divert interstate water to bear a greater risk of an erroneous decision than a mere preponderance standard affords. *Id.* at 316. The Court further viewed the heightened standard as representative of the societal interest in the security of interstate water. *Id.* at 315-16.

95. Addington v. Texas, 441 U.S. 418 (1979); Santosky v. Kramer, 455 U.S. 745 (1982). The Court has also found a clear and convincing standard necessary in deportation and denaturalization proceedings. *See* cases discussed in *Santosky*, 455 U.S. at 759.

96. *Addington*, 441 U.S. at 418.

97. *Santosky*, 455 U.S. at 745.

98. *Addington*, 441 U.S. at 425-29; *Santosky*, 455 U.S. at 766-68. *See also* Colorado v. New Mexico, 467 U.S. 310 (1984).

99. *Addington*, 441 U.S. at 425-26; *Santosky*, 455 U.S. at 764. *See also* United States v. Salerno, 481 U.S. 739, 750-51 (1987) (the Court relied, in part, on the use of the heightened "clear and convincing" standard to justify the intrusion upon an "individual's strong interest in liberty" by the pretrial detention provisions of the Bail Reform Act).

100. *Santosky*, 441 U.S. at 764-65; *Colorado*, 467 U.S. at 315-16.

less significant, a lower standard is acceptable to the Court. For instance, the Court upheld a statutory provision which required a five-year minimum mandatory sentence if the judge found by a preponderance that the defendant "visibly possessed a firearm" during the commission of specified crimes.[101] The Court rejected the argument that this sentencing guideline created a new element of the crime which would necessitate a finding beyond a reasonable doubt under *Winship* and its progeny.[102] It is important to note that the mandatory sentence did not increase the penalty beyond the term of years authorized for the crime; it merely limited the sentencing judge's discretion on incarceration.[103] The Court distinguished an ordinary sentencing procedure in *McMillan* from an unusual one,[104] such as where a penalty could be greatly increased by a sentencing finding.[105] Where the impact of the sentencing finding is significant, the Court indicated there could be constitutional concerns.[106]

The Court has similarly noted a concern for risk allocation and the seriousness of the decision in a case upholding a preponderance standard for a determination of paternity. In *Rivera v. Minnich*,[107] the Court distinguished *Winship*, the involuntary civil commitment, and parental rights cases, where a higher standard of proof was required, for three reasons. First, there was no right, such as a parental relationship, that was being taken away.[108] Thus, the nature of the interest was less significant in a paternity case. Second, the proceedings were between two individuals rather than between an individual and the state.[109] The Court saw no reason to impose a greater risk of erroneous decision on one party when they were both private interests.[110] In contrast, where the state is pitted against an individual, the Court emphasized a need for a higher standard of proof because of unequal resources and because often the consequences are so serious in such cases.[111]

The Court has similarly found that preliminary determinations on the admissibility of evidence in criminal trials do not warrant a higher standard than preponderance. The Court has contrasted these admissibility decisions with the

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101. McMillan v. Pennsylvania, 477 U.S. 79 (1986).

102. *Id.* at 86-87. In particular, the Court found that the sentencing finding was not an element of the crime requiring a heightened standard pursuant to its analysis in *Patterson*, 432 U.S. at 197. *See supra* note 88.

103. *McMillan*, 477 U.S. at 87-88.

104. This characterization as an ordinary sentencing was recently relied upon by the Ninth Circuit in holding that a preponderance standard was sufficient for the judge's findings under the Federal Sentencing Guidelines. *See* United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990).

105. *McMillan*, 477 U.S. at 89-91. The Court referred to Specht v. Patterson, 386 U.S. 605 (1967), where a defendant convicted of a sexual offense with a maximum 10-year penalty could receive life imprisonment upon a sentencing finding of the defendant's continued dangerousness, habitual criminality, or mental illness. In *Specht*, the Court held that the sentencing process without a formal hearing violated due process. The Court in *McMillan* indicates that there also might have been a due process issue regarding the standard of proof if the Court reviewed such a sentencing proceeding now in the aftermath of *Winship*, which had not been decided when the Court considered *Specht*. *McMillan*, 477 U.S. at 89-91.

106. *McMillan*, 477 U.S. at 89-91.

107. 483 U.S. 574 (1987).

108. *Id.* at 579-82.

109. *Id.* at 580-81.

110. *Id.*

111. *Id.* The Court also viewed a higher standard in proceedings to terminate parental rights as a means to force some finality on issues that, unlike paternity, could be continually relitigated. *Id.* at 582.

substantive decisions in a criminal trial that have a greater impact.[112] Consequently, with few exceptions,[113] the Court has found that a preponderance is sufficient for decisions on the admissibility of evidence that is subject to fourth and fifth amendment strictures, such as the voluntariness of a consent to search[114] or a confession[115] and the adequacy of a waiver of *Miranda* rights.[116] Similarly, the Court has held that nonconstitutional preliminary evidentiary issues are subject to a preponderance determination. For example, the trial judge must find by only a preponderance that a conspiracy exists in order to admit a co-conspirator statement under a hearsay exemption.[117] These preliminary issues affect only the admissibility of evidence and are not the final decisions on guilt or innocence.

Whether preliminary matter or final issue, the standard of proof is important whenever a decision is being made where there is a risk of error. The standard advises the decisionmaker of the level of confidence necessary in order to make the decision. It also reflects society's judgment on the relative weight to be given to the interests of each party. In this line of cases on standards of proof, the Supreme Court consistently analyzed the relative importance of the interests at stake, including the consequences of the decision, and the resulting need for shifting the allocation of risk. Thus, preliminary evidentiary matters, with a modest impact compared with issues deciding the cases, do not necessitate heightened review. Similarly, a reduction in sentencing discretion in a typical proceeding, which does not change the nature of the permissible sentence, is not significant enough to warrant an increased standard of proof. Even a substantive determination, such as paternity, does not require a heightened standard of proof where the interests are of equal value. However, when the individual's interest at stake, such as parental rights, liberty from involuntary civil commitment or criminal incarceration, is of greater value, a higher standard of proof is constitutionally imposed. The higher standard protects the valued interest, allocating the risk of error to the other party (most often the state or federal government). Moreover, society's judgment of the high value attached to the interest is communicated to the decisionmaker by instructions on the standard of

112. Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("[t]hus, the evidentiary standard is unrelated to the burden of proof on the substantive issues. . .").

113. One exception is the admissibility of an in-court identification after a post-indictment lineup without counsel. The lineup would be per se inadmissible as a violation of the right to counsel under the sixth amendment pursuant to United States v. Wade, 388 U.S. 218 (1967). The in-court identification is permitted if the government can "establish by clear and convincing evidence" that the in-court identification has a basis independent of the lineup. *Id.* at 240.

114. United States v. Matlock, 415 U.S. 164 (1974).

115. Lego v. Twomey, 404 U.S. 477 (1972).

116. Colorado v. Connelly, 479 U.S. 157 (1986). The Court found a preponderance sufficient where the interests being compared were deterring police coercion and the admissibility of probative evidence. The Court viewed the deterrence purpose as unconnected with the reliability of the evidence. Thus, a preponderance was sufficient where the purpose was irrelevant to the reliability of the verdict. *Id.* at 167-69.

117. *Bourjaily*, 483 U.S. 171. Fed. R. Evid. 801(d)(2)(E) provides that a co-conspirator's statement is "nonhearsay," rather than an "exception" to the hearsay rule. The proponent of the evidence must establish that the declarant was a co-conspirator of the party against whom it is offered and that the statement was made during and in furtherance of the conspiracy.

proof. Our judicial system thus achieves its purpose of rendering decisions with the degree of certitude proportional to the interests at stake.

Although in this line of cases on standards of proof the Supreme Court has not grappled with the standard of proof in a capital case, lower courts have faced the issue whether to require a heightened standard of proof in capital cases. The lower courts' analyses have invoked the cruel and unusual punishment clause of the eighth amendment, the due process clause of the fourteenth amendment, and statutory construction principles. The next two sections address, respectively, 1) states adopting a beyond a reasonable doubt standard and 2) states rejecting a beyond a reasonable doubt standard in the penalty phase of capital cases.

IV. States Adopting a Beyond a Reasonable Doubt Standard in the Penalty Phase

Seven states require that the jury reach a determination beyond a reasonable doubt in the penalty phase. They are Arkansas, Colorado, New Jersey, Ohio, Texas, Utah and Washington. The precise decision that must be made beyond a reasonable doubt, such as finding "aggravating circumstances outweigh mitigating circumstances" or that "death is the appropriate remedy," varies in each state. The beyond a reasonable doubt standard is statutorily prescribed in five of the seven states. The other two states require the high standard as a result of a state supreme court decision.[118]

Ohio, New Jersey, Arkansas, Washington, and Texas have a statutory requirement that a penalty phase determination be made beyond a reasonable doubt. The precise determination to which the standard is applied varies, however. Thus, although each of the five states is similar in requiring a decision beyond a reasonable doubt, each differs in its wording of the penalty decision. Ohio and New Jersey are the most straightforward. Their statutes provide that the prosecution must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.[119] Arkansas has a similar "outweighing"

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118. Although New Jersey now has a statutorily prescribed beyond a reasonable doubt standard, the New Jersey Supreme Court had interpreted its prior statute, which was silent on the standard, to require a determination beyond a reasonable doubt. Both the New Jersey statute and the court decision will be discussed. *See infra* notes 119 and 124-44 and accompanying text. North Carolina is a third state where the state supreme court appeared to interpret its statute to require a finding that, after weighing aggravating and mitigating circumstances, the jury "was convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case." State v. McDougall, 308 N.C. 1, 34, 301 S.E.2d 308, 327-28 (1983). *See also* Note, *Criminal Procedure—North Carolina's Capital Sentencing Procedure: The Struggle for an Acceptable Jury Instruction*, 62 N.C.L. REV. 833, 840 n.47 (1984). However, in subsequent decisions, the North Carolina Supreme Court has affirmed death verdicts despite challenges to jury instructions that failed to state a beyond a reasonable doubt standard. State v. Maynard, 311 N.C. 1, 32, 316 S.E.2d 197, 214 (1984); State v. Boyd, 311 N.C. 408, 432, 319 S.E.2d 189, 205 (1984), *cert. denied*, 471 U.S. 1030 (1985). Consequently, North Carolina is not discussed here as a state that requires a beyond a reasonable doubt standard.

119. OHIO REV. CODE ANN. § 2929.03(D)(1) (Baldwin 1990) provides:

> The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1990) provides: "If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors."

requirement that must be proved beyond a reasonable doubt.[120] Additionally, however, Arkansas requires a finding that "[a]ggravating circumstances justify a sentence of death beyond a reasonable doubt" before death may be imposed.[121] Washington's statute is a variation on Ohio's, but worded as a negative instead of an affirmative determination. The determination is whether the sentencer is "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency."[122] The Texas determination is different in content from the others. To impose death, the sentencer must determine each of three issues beyond a reasonable doubt. The sentencer must find that the murder was "committed deliberately and with the reasonable expectation that the death . . . would result"; that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and, if pertinent, whether the killing was "unreasonable in response to the provocation" by the victim.[123] Despite the variations in statutory language, the effect of each statute is to require the sentencer to be certain that death is warranted beyond a reasonable doubt. Because the standard of proof is statutory, the reasoning behind adopting the standard is not as apparent as it is from the court decisions of Colorado, New Jersey and Utah.

New Jersey, Utah and Colorado state supreme court decisions have enunciated a beyond a reasonable doubt standard for the penalty determination where the statute is silent.[124] Although the New Jersey statute now expressly contains a beyond a reasonable doubt standard as noted above,[125] the New Jersey Supreme Court interpreted an older statute to require the same high standard.[126] The older statute stated only that the jury must find that aggravating circumstances were not outweighed by mitigating circumstances.[127] Similar to Arkansas' statute, Utah's penalty determination is a two-pronged one. The jury must find both that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate penalty beyond a reasonable doubt.[128] The

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120. ARK. STAT. ANN. § 5-4-603(a)(2) (1987) provides that the jury must find that: "Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist."

121. ARK. STAT. ANN. § 5-4-603(a)(3).

122. WASH. REV. CODE § 10.95.060(4) (Supp. 1989).

123. TEX STAT. ANN. art. 37.071(b) and (c) (Vernon Supp. 1990). The full text of the statute provides:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

124. State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987); State v. Holland, 777 P.2d 1019 (Utah 1989); State v. Wood, 648 P.2d 71 (Utah 1982); People v. Tenneson, 788 P.2d 786 (Colo. 1990).

125. *See supra* note 119 and accompanying text.

126. *Biegenwald*, 106 N.J. 13, 524 A.2d 130.

127. *Id.* at 58, 524 A.2d at 153. *See also* "Historical Note" to N.J. STAT. ANN. § 2C:11-3 (West Supp. 1990).

128. *See Wood*, 648 P.2d at 78-81.

statute states neither the two-pronged determination nor any standard of proof.[129] Although the Colorado statute was originally a two-pronged process like the Utah statute,[130] it now provides for a single finding by the jury that if "there are insufficient . . . mitigating factors . . . to outweigh any . . . aggravating factors . . . the jury shall return a sentence of death."[131] All three state supreme courts acknowledged that the weighing process in the penalty phase was not a fact-finding process.[132] Each court, however, recognized a need for certainty in deciding on death as a punishment that demands our legal system's highest standard.[133]

Much of the rationale of each court is grounded in concepts implicit in the fourteenth amendment's due process clause and the eighth amendment's cruel and unusual punishment clause. In *Biegenwald*,[134] for example, the New Jersey Supreme Court relied on a classic due process idea: "What is at stake is the fundamental fairness of a system that generates life and death decisions."[135] In the course of two decisions, the Utah Supreme Court referred to eighth amendment and due process ideas. The court stated that "the death penalty may be imposed only when consistent with 'the fundamental respect for humanity underlying the Eighth Amendment.' "[136] The court also referred to the "basic procedural requirements of the Due Process Clause"[137] that impose a beyond a reasonable doubt standard in criminal cases to assure a "high degree of certitude."[138] The court found that such a high degree of certitude "conveys to the jury the concept that the values upon which the criminal justice system is built do not permit the ultimate sanction to be imposed unless the conclusion is free of substantial doubt . . . ."[139] The Colorado court also relied on concepts from both amendments. The court cited to an eighth amendment concept of reliability because death is such a unique penalty[140] and to a due process concept of the "degree of certainty" that should be necessary to render a death verdict.[141]

None of the three courts, however, ultimately based its requirement of a penalty determination beyond a reasonable doubt on the Constitution. Each court relied upon an interpretation of its own statutory scheme. Although using

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129. UTAH CODE ANN. § 76-3-207 (Supp. 1989) outlines the procedures for conducting the penalty phase proceedings, including convention of the same jury, presentation of evidence, unanimity of the verdict, and appeal process, but does not spell out the precise determination to be made.

130. People v. Tenneson, 788 P.2d 786, 791 (Colo. 1990).

131. *Id.* at 796 n.13.

132. *Biegenwald*, 106 N.J. at 62, 524 A.2d at 156; *Holland*, 777 P.2d at 1027 n.4, quoting *Wood*, 648 P.2d at 84; *Tenneson*, 788 P.2d at 794.

133. *Biegenwald*, 106 N.J. at 60, 524 A.2d at 155 ("We can think of no judgment of any jury in this state in any case that has as strong a claim to the requirement of certainty as does this one."); *Wood*, 648 P.2d at 81 (need for a high degree of confidence that the penalty is appropriate) and at 84 ("the necessity for a high degree of certitude"); *Tenneson*, 788 P.2d at 794 (a beyond a reasonable doubt standard "serves well to communicate to the jurors the degree of certainty that they must possess . . .").

134. 106 N.J. 13, 524 A.2d 130.

135. *Id.* at 66, 524 A.2d at 158.

136. *Wood*, 648 P.2d at 81.

137. *Id.*

138. *Id.* at 84.

139. *Id.* at 84 n.11, quoting State v. Brown, 607 P.2d 261, 275 (Utah 1980) (Stewart, J., concurring).

140. *Tenneson*, 788 P.2d at 792.

141. *Id.* at 795.

the constitutional concept of "fundamental fairness," the New Jersey court indicated that "proof beyond a reasonable doubt in criminal prosecutions" in New Jersey "antedates any suggestion that the Constitution compels that burden."[142] The court never cited the federal or state constitutions. The "fundamental fairness" concept appeared to be considered a state common law idea.[143] The New Jersey court also found support in the legislative history of both the old and new death penalty statutes where the beyond a reasonable doubt standard was discussed.[144] The Utah court looked to the general provisions of the state criminal code that provide that the code should be interpreted to provide for proportionate penalties[145] and to avoid "arbitrary or oppressive treatment" of accused persons.[146] Although citing extensively to eighth and fourteenth amendment cases, the Colorado court rested its requirement upon an interpretation of legislative intent to want to ensure the constitutionality and reliability of the verdict.[147]

Thus, there is no direct state court holding that a beyond a reasonable doubt standard is constitutionally required. The high standard of proof is either an explicit statutory requirement (as in Ohio, Arkansas, Washington, Texas, and the current New Jersey code), or an interpretation of a statute on the basis of general principles of statutory construction (Colorado, Utah and the older New Jersey code).

States rejecting a beyond a reasonable doubt standard, on the other hand, have had to wrestle with the constitutional issues. Those states are discussed next.

V. States Rejecting a Beyond a Reasonable Doubt Standard in the Penalty Phase

Courts interpreting the statutes of eleven states have explicitly rejected a beyond a reasonable doubt standard in the penalty phase.[148] These states are Alabama, California, Florida, Idaho, Illinois, Indiana, Maryland, Mississippi,

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142. *Biegenwald*, 106 N.J. at 53, 59, 524 A.2d at 154.

143. The court, at one point, referred to the suggestion of a beyond a reasonable doubt standard contained in the report of the "Trial Judges' Committee on Capital Causes" as "presumably based on New Jersey's traditional concern for the rights of defendants charged with capital offenses." *Biegenwald*, 106 N.J. at 58-59, 524 A.2d at 154.

144. *Id.* at 62-66, 524 A.2d at 156-57.

145. State v. Wood, 648 P.2d 71, 83 (Utah 1982), quoting Utah Code Ann. § 76-1-104(3) (1953)(now 1990 Replacement).

146. *Id.* quoting from Utah Code Ann. § 76-1-104(4) (1953) (now 1990 Replacement).

147. *Tenneson*, 788 P.2d at 792 n.9.

148. A challenge to the Arizona statute on the grounds it did not provide for a penalty finding beyond a reasonable doubt was also rejected by a federal district court in 1986. Jeffers v. Ricketts, 627 F.Supp. 1334, 1362 (D. Ariz. 1986), *rev'd on other grounds*, 832 F.2d 476 (9th Cir. 1987), *rev'd sub nom.* Lewis v. Jeffers, 110 S. Ct. 3092 (1990). The Ninth Circuit subsequently held the Arizona death penalty scheme unconstitutional for requiring the defendant to prove the existence of mitigating circumstances by a preponderance before the trier may consider such factors and for placing the burden of proof on the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 3287 (1990). However, the United States Supreme Court has just recently upheld the Arizona scheme in Walton v. Arizona, 110 S. Ct. 3047 (1990).

The issue of the standard of proof has also arisen in a case involving the Wyoming statute. A federal district court rather summarily rejected a beyond a reasonable doubt requirement as constitutionally mandated. Osborn v. Shillinger, 639 F. Supp. 610 (D. Wyo. 1986), *aff'd*, 861 F.2d 612 (1988). Because the federal court did not

Missouri, New Mexico, and Oklahoma. Only one state, Maryland, has an alternative standard stated in its statute.[149] The statutes of the other states contain no standard. Defendants in each of the eleven states argued for a beyond a reasonable doubt standard on constitutional grounds. In each case, the courts rejected the constitutional challenge. The reasoning of the opinions is described in this section. The strengths and weaknesses of the courts' analyses are discussed subsequently in the final section.

Although the constitutional challenge to the standard of proof is the same, the penalty determination in the eleven states is expressed in many different ways. Alabama, California, Indiana, and New Mexico require that aggravating circumstances outweigh mitigating circumstances before death may be imposed.[150] Florida, Idaho, Illinois, Maryland, Mississippi, Missouri, and Oklahoma reverse the determination: Death is authorized if mitigating circumstances do not outweigh aggravating circumstances.[151] The result of the weighing process appears to be determinative of life or death in Alabama, California, Idaho, Illinois, and Maryland.[152] On the other hand, Florida, Indiana, Missis-

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discuss the issue of the standard of proof and the Wyoming court has not addressed the issue, Wyoming is not included in the discussion of this section.

149. MD. ANN. CODE art. 27, § 413(h) (1957).

150. ALA. CODE § 13A-5-46(e)(1982) (advisory jury) and § 13A-5-47(e) (court determination) (death if the aggravating circumstances outweigh mitigating circumstances; also provides that advisory jury must return life if in equilibrium; if aggravating circumstances do not outweigh mitigating circumstances, jury must return verdict of life).

CAL. PENAL CODE § 190.3 (West 1988) (death "shall" be imposed if "aggravating circumstances outweigh the mitigating circumstances").

IND. CODE ANN. § 35-50-2-9(e)(2) (West Supp. 1989) (advisory jury and court "may" impose death if "any mitigating circumstances that exist are outweighed by the aggravating . . . circumstances").

N.M. STAT. ANN. § 31-20A-2 (B) (1989) merely provides that the jury or judge decides on life or death on the basis of "weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime." New Mexico's statutory language is the least specific of the states discussed here in defining the determination to be made by the trier. However, the New Mexico Uniform Jury Instruction 14-7030 provides, in addition to restating the statute, that death can only be imposed if "aggravating circumstance(s) . . . outweigh the mitigating circumstances." Consequently, New Mexico was categorized with those states that define the weighing process in this manner. *See infra* note 148 and accompanying text, however, for further discussion of the New Mexico instruction which also provides that the trier choose life regardless of the outcome of the weighing process.

151. FLA. STAT. ANN. § 921.141(2) and (3) (West 1985) (advisory jury and then court must determine if mitigating circumstances outweigh the aggravating circumstances).

IDAHO CODE § 19-2515(c) (1987) ("the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance . . .").

ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1989) ("[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death).

MD. ANN. CODE art. 27, § 413(h)(2) (1957) ("If [jury or court] finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death").

MISS. CODE ANN. § 99-19-101(2)-(3) (Supp. 1988) (death is authorized if "there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances").

MO. ANN. STAT. § 565.030(4)(3) (Vernon Supp. 1990) (death may not be imposed "[i]f the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier").

OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1990) (death may not be imposed "if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances").

152. ALA. CODE § 13A-5-46(e)(3) (1982) requires the advisory jury to return a verdict of death if the aggravating circumstances outweigh the mitigating circumstances. It is less clear whether the court may impose life

sippi, Missouri, New Mexico, and Oklahoma authorize the trier to ignore the result of the weighing process and impose life rather than death if that is the trier's choice under all the circumstances.[153]

Regardless of the phraseology of the statute, one common threshold reason for rejecting a beyond a reasonable doubt standard is that the weighing process is not a factual determination.[154] The underlying premise is that standards of

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even if aggravating circumstances outweigh death. It does not appear to be an option, however, given the language of § 13A-5-47(e), which requires the court to make the balancing determination.

CAL. PENAL CODE § 190.3 (West 1988) requires that the trier impose death if aggravating circumstances outweigh mitigating circumstances. Although the current uniform jury instruction, 1 Cal. Jury Instructions, Criminal 8.88 (Supp. 1990), does not instruct in mandatory language, the use of a prior version which did mandate death was recently upheld by the United States Supreme Court in Boyde v. California, 110 S. Ct. 1190 (1990). See also Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990), decided five days prior to *Boyde*, for a fuller discussion of the constitutionality of the mandatory language.

IDAHO CODE § 19-2515 (1987) provides that "the court shall sentence the defendant to death unless the court finds that mitigating circumstances. . .outweigh the. . .aggravating circumstance. . . ."

ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1989) provides that death "shall" be imposed "[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence."

MD ANN. CODE art. 27, § 413(h)(2) (1957) provides: "If [court or jury] finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death."

153. FLA. STAT. ANN. § 921.141(2)(c) (West 1985). The statutory language is phrased in terms of finding mitigation to outweigh aggravation and then "based on these considerations" [finding an aggravating circumstance and then looking at whether mitigation outweighs aggravation], the advisory jury should decide death or life. On the face of the statute, it appears as though the jury could recommend life even if aggravating factors outweigh mitigating factors. At one point, the Florida Supreme Court found no error in instructing jurors that death is presumed appropriate unless mitigating factors outweigh aggravating factors. Jackson v. Wainwright, 421 So. 2d 1385 (Fla. 1982), *cert. denied*, 463 U.S. 1229 (1983). However, the Eleventh Circuit Court of Appeals held such an instruction unconstitutional under the eighth amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), *cert. denied*, 486 U.S. 1026 (1988). The Eleventh Circuit holding may be of questionable validity in light of *Boyde*, 110 S. Ct. 1190 and *Blystone*, 110 S. Ct. 1078, which upheld an instruction that death *must* be imposed if the aggravating circumstances outweigh the mitigating circumstances. The court in Florida ultimately decides the penalty. Although there is nothing specific in the statute, it appears as though the court must only justify its sentence by balancing aggravating and mitigating factors if it imposes death. FLA. STAT. ANN. § 921.141(3).

IND. CODE ANN. § 35-50-2-9(e) (West Supp. 1989) provides that the jury "may" recommend death if it balances in favor of aggravating circumstances. *See also* Williams v. State, 525 N.E.2d 1238 (Ind. 1988). The court in imposing sentence after an advisory jury is to use the same standards as the jury, so presumably would be able to exercise discretion. Oddly enough, it is less clear if the court has any discretion in imposing death where aggravation outweighs mitigation when the penalty is tried exclusively to the court. There the statute provides that the court "shall" impose death "only if it finds" that "mitigating circumstances . . . are outweighed . . . ." § 35-50-2-9(g).

MISS. CODE ANN. § 99-19-101(2)(d) (Supp. 1988) provides that, even after finding aggravation outweighs mitigation, the trier is to decide if "[b]ased on these considerations, . . . the defendant should be sentenced to life imprisonment or death."

MO. ANN. STAT. § 565.030(4)(4) (Vernon Supp. 1990) provides that, even if aggravation outweighs mitigation, life can be imposed "[i]f the trier decides under all of the circumstances not to assess and declare the punishment of death."

N.M. STAT. ANN. § 31-20A-2 (1984) does not express any requirement that the weighing process be determinative of the sentence. It treats the weighing process as a "consideration." In addition, Uniform Jury Instruction 14-7030 provides specifically that "even if the aggravating circumstance(s) outweigh the mitigating circumstances, you may still set the penalty at life imprisonment."

OKLA. STAT. ANN. tit. 21, § 701.11. Although the statute does not address the impact of finding aggravation outweighs mitigation, in Johnson v. State, 731 P.2d 993, 1003 (Okla. Crim. App. 1987), the Oklahoma Court of Criminal Appeals found the given instructions adequate to express that death was optional even if aggravating circumstances outweighed mitigating circumstances.

154. Whisenhant v. State, 482 So.2d 1225, 1235 (Ala. Crim. App. 1982), *aff'd*, 482 So.2d 1241, 1245 (Ala. 1983) (citations omitted) (" 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, . . . the relative *weight* is not.' "); People v.

proof apply to proof of facts, not to normative issues.[155] Since weighing aggravating and mitigating circumstances is not proof of a fact, no standard of proof can apply or is necessary.[156] These courts distinguish finding the existence of an aggravating circumstance[157] (which has a standard of beyond a reasonable doubt)[158] and sometimes the existence of a mitigating circumstance[159] (which on occasion has a defined standard of a preponderance) as factual decisions.

Labeling the weighing process as a balancing rather than a factual determination is merely a beginning point. All of the courts rejecting a beyond a reasonable doubt standard have had to address the issue on a constitutional basis. There are two constitutional theories on which the courts relied to reject the standard: a fourteenth amendment due process theory and an eighth amendment cruel and unusual punishment theory.

The due process theory is related to the finding that the balancing of aggravating and mitigating factors is not a "factual" issue. Many of the courts found that a determination that aggravation outweighs mitigation is not a factual element of capital murder.[160] Because the weighing process is not an element, the courts found there is no due process obligation on the state to prove aggravation outweighs mitigation beyond a reasonable doubt.[161]

The second constitutional basis is the eighth amendment. Here the courts look to the language of United States Supreme Court opinions that speak of narrowing the class of defendants who are death-eligible, but then permitting the trier extensive discretion in setting the penalty.[162] This concept is interpreted to support and condone the lack of a standard of proof to guide the trier in weighing aggravating and mitigating circumstances.[163] The idea is that the

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Rodriguez, 42 Cal. 3d 730, 779, 230 Cal.Rptr. 667, 698, 726 P.2d 113, 144 (1986) ("the sentencing function is inherently moral and normative, not factual"); State v. Sivak, 105 Idaho 900, 905, 674 P.2d 396, 401 (1983) (weighing process "not susceptible" to proof); Moore v. State, 479 N.E.2d 1264, 1281 (Ind.), *cert. denied*, 474 U.S. 1026 (1985) (weight not fact, but "balancing process"); State v. Bolder, 635 S.W.2d 673, 684 (Mo. 1982) (en banc) (not a factual determination, but "a more subjective process"); *Johnson*, 731 P.2d at 1005, *cert. denied*, 484 U.S. 878 (not factual, but a "balancing process"); Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983) (distinguishes "proof of facts" from "the weighing of facts in sentencing").

155. *See Strickland*, 696 F.2d at 818; *Bolder*, 635 S.W.2d at 684.

156. *See Strickland*, 696 F.2d at 818; *Bolder*, 635 S.W.2d at 684.

157. *Strickland*, 696 F.2d at 818; *Whisenhant*, 482 So.2d at 1235; *Sivak*, 105 Idaho at 905, 674 P.2d at 401.

158. *See, e.g.*, CAL. PENAL CODE § 190.4(a) (West 1988); MD. ANN. CODE art. 27, § 413(d) (1988); MO ANN. STAT. § 565.030(4) (Vernon Supp. 1990).

159. *See, e.g., Strickland*, 696 F.2d at 818.

160. *Strickland*, 696 F.2d at 818; *Whisenhant*, 482 So. 2d at 1234-35.

161. The courts are referring to the beyond a reasonable doubt standard laid out as a due process requirement in *In re* Winship, 397 U.S. 358 (1970), and to the Supreme Court's decision in Patterson v. New York, 432 U.S. 197 (1977), which held that the State is only required to prove the facts constituting the crime beyond a reasonable doubt and does not have to bear the burden to disprove an affirmative defense that does not negate an element. *See Strickland*, 696 F.2d at 818; *Whisenhant*, 482 So.2d at 1234-35; Johnson v. State, 731 P.2d 993, 1005; People v. Garcia, 97 Ill. 2d 58, 80, 454 N.E.2d 274, 283 (1983); Tichnell v. State, 287 Md. 695, 732, 415 A.2d 830, 849 (1980). *Patterson* has received criticism for its simplistic approach not satisfying due process theory. *See, e.g.*, Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AMER. CRIM. L. REV. 393 (1983).

162. *See, e.g., Rodriguez*, 42 Cal. 3d at 777-78, 230 Cal. Rptr. at 697-98, 726 P.2d at 143-44; *Sivak*, 105 Idaho at 905, 674 P.2d at 401.

163. *See, e.g., Strickland*, 696 F.2d at 818; *Sivak*, 105 Idaho at 905, 674 P.2d at 401; Moore v. State, 479 N.E.2d 1264, 1275 (Ind.), *cert. denied*, 474 U.S. 1206 (1985); People v. Eddmonds, 101 Ill. 2d 44, 67-68, 461 N.E.2d 347, 359, *cert. denied*, 469 U.S. 894 (1984).

trier has complete discretion in assessing the weight of the factors.[164] The trier could find one mitigating factor, for instance, outweighs five aggravating factors. Consequently, a standard of proof is either unnecessary or counterproductive.[165] The courts view the constitutional guarantee of a nonarbitrary penalty as satisfied by allowing the consideration of all relevant information on aggravating and mitigating factors.[166] These courts often further point to rejection of constitutional challenges to death penalty statutes by the United States Supreme Court as approval of standardless penalty proceedings.[167] The courts most frequently cite *Gregg* and *Proffitt* as examples of constitutional death penalty schemes without a beyond a reasonable doubt standard, even though the Court did not directly address the issue of a standard in those cases.[168]

The statutes of eleven states have, thus, survived constitutional challenge for imposing death without a beyond a reasonable doubt determination. The constitutional analysis has not been fully developed, however, either through the cases rejecting a beyond a reasonable doubt standard or through those adopting such a standard. No court has directly found a constitutional rationale for requiring a beyond a reasonable doubt standard,[169] although undoubtedly the impetus for the statutory standards in the five states with a prescribed beyond a reasonable doubt standard was concern for either fundamental fairness or channeling the discretion of the sentencer.[170] The courts which have held that the Constitution does not require the heightened scrutiny have not gone beneath the surface of the due process issue. The final section discusses the constitutional arguments for a beyond a reasonable doubt standard in the penalty phase.

VI. A Constitutional Rationale for Requiring a Beyond a Reasonable Doubt Standard in Capital Penalty Proceedings

Both the policy behind using a standard of proof and constitutional law provide strong arguments for incorporating a beyond a reasonable doubt standard into the penalty phase of capital cases. This section addresses the arguments and likelihood of success under eighth and fourteenth amendment theories. The eighth amendment is rejected as a viable basis for a beyond a reasonable doubt requirement in light of current Supreme Court decisions. An

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164. *See, e.g., Whisenhant*, 428 So. 2d at 1234; 101 Ill. 2d at 67-68, 461 N.E.2d at 358.

165. *See Eddmonds*, 101 Ill. 2d at 68, 461 N.E.2d at 359; *Garcia*, 97 Ill. 2d at 80, 454 N.E.2d at 283.

166. *See Moore*, 479 N.E.2d at 1282, *quoting* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982); *Garcia*, 97 Ill. 2d at 68, 454 N.E.2d at 283.

167. *See* Gray v. Lucas, 677 F.2d 1086, 1107 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983); *Strickland*, 696 F.2d at 818; *Bolder*, 635 S.W.2d at 684; *Moore*, 479 N.E.2d at 1280; *Garcia*, 97 Ill. 2d at 68, 454 N.E.2d at 283; Hill v. State, 432 So.2d 427, 442 (Miss. 1983); Tichnell v. State, 287 Md. 687, 733, 415 A.2d 830, 850 (1980).

168. *Gray*, 677 F.2d at 1107; *Strickland*, 696 F.2d at 818; *Bolder*, 635 S.W.2d at 684 (*Proffitt*); *Moore*, 479 N.E.2d at 1281 (*Proffitt*); *Garcia*, 97 Ill. 2d at 68, 454 N.E.2d at 283 (*Gregg* and *Proffitt*); *Tichnell*, 287 Md. at 733, 415 A.2d at 850 (*Proffitt, Gregg*, and *Jurek*) (*Jurek* is inappropriately cited since the Texas statute specifically states a beyond a reasonable doubt standard).

169. *See supra* text accompanying notes 124-47, where the reliance on statutory construction rather than a constitutional basis is discussed.

170. *See, e.g.*, the discussion of the reasoning of the New Jersey court just prior to the amendment of the statute. *See supra* text accompanying notes 134-35.

analysis under the due process clause of the fourteenth amendment, however, supplies a compelling, independent theory on which to base a beyond a reasonable doubt requirement in the penalty phase.

A. *Eighth Amendment Theory*

The heart of eighth amendment jurisprudence in capital cases has been to eliminate the arbitrary imposition of the death penalty.[171] Requiring a high degree of certitude in making the decision to impose death would certainly advance the nonarbitrariness of the penalty by providing guidance to the factfinder.[172] It would be one more assurance that only the most heinous offenders would be separated out to receive the death penalty. A high standard of proof would also be consistent with the use of the eighth amendment to provide procedural as well as substantive protection in capital cases.[173]

However, the Supreme Court would, in all likelihood, reject an eighth amendment argument on the grounds that the Georgia and Florida statutes approved in 1976 contained no beyond a reasonable doubt standard.[174] The Texas statute, also approved in 1976, did require findings beyond a reasonable doubt,[175] but the Court has already indicated repeatedly that conformance with any one of the three statutes approved in 1976 is sufficient.[176] Most lower courts have rejected an eighth amendment argument, in part on the basis that there was no such requirement in *Gregg* or *Proffitt*.[177] Even the two states where a state court, rather than the legislature, adopted a beyond a reasonable doubt standard did so on the basis of statutory construction rather than an eighth amendment theory.[178] Although it is arguable that the Court in fact modified the original procedure approved in *Proffitt* when it later held that nonstatutory mitigating circumstances had to be permitted under the Florida scheme,[179] the predominant line of cases refuses to consider new challenges to the procedures

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171. *See supra* text accompanying notes 10 and 17. See also Mills v. Maryland, 486 U.S. 367, 383-84 (1988) as an example of the Court continuing to reiterate the need for "reliability on the determination that death is the appropriate penalty in a particular case."

172. Despite all the requirements imposed through the eighth amendment on states to assure a nonarbitrary sentence, there is room for arbitrariness each step of the way. *See* discussion of arbitrariness in each stage of a capital case, from the decision to seek death to post-conviction proceedings, in Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986).

173. The Court has used the eighth amendment to impose both procedural and substantive requirement in death penalty cases. *See* Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty. . .").

174. *See supra* text accompanying notes 33 & 35.

175. *See supra* text accompanying note 34.

176. *See supra* text accompanying notes 49-58. Although it is interesting to note that in Barclay v. Florida, 463 U.S. 939, 958 (1983), quoting from Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the court took particular note of the Florida judicially imposed rule that a trial judge cannot override an advisory jury verdict of life unless " 'virtually no reasonable person could differ.' " (citations omitted). Thus, the Court was relying, in part, on a heightened standard of proof in one aspect of the Florida system to uphold it.

177. *See supra* text accompanying notes 167-68.

178. *See supra* text accompanying notes 142-46.

179. *See supra* text accompanying notes 46-48.

approved in 1976.[180] Thus, despite the fact that no one challenged the failure to have a beyond a reasonable doubt standard in the penalty phase in 1976, the argument is probably pointless today under an eighth amendment theory.

B. *Due Process Theory*

An analysis of a due process theory involves an examination of the nature of the decision being made in the penalty phase as well as the Supreme Court's decisions on standards of proof. This subsection first looks at the preliminary question of the need for a standard of proof for the penalty phase decision. The second part of this subsection focuses on the Supreme Court's decisions to justify beyond a reasonable doubt as the standard of proof.

1. *The Need for a Standard of Proof*

The need for a standard of proof is in part dependent upon the preliminary question of who bears the burden of persuasion on the penalty phase decision. Although a plurality of the Supreme Court has upheld placing the burden of persuasion on the defendant,[181] the Court failed to appreciate the nature of the penalty proceeding. The penalty phase operates largely as a trial, not as a typical sentencing proceeeding.[182] There is usually a right to a jury, evidence is presented with observance of the rules of evidence, and argument is made to the factfinder.[183] As Justice O'Connor stated in a recent concurring opinion, "As a practical matter we have virtually required that the death penalty be imposed only when a guilty verdict has been followed by separate trial-like sentencing proceedings, and we have extended many of the procedural restrictions applicable during criminal trials into these proceedings."[184] Applying the analogy to a trial, the critical weighing decision in the penalty phase of a capital case is comparable to the elements of a crime in the guilt phase. Just as the state must prove the elements of a crime[185] and an aggravating circumstance,[186] by analogy, the state should prove that death is the appropriate penalty or, as it is typically stated, that aggravating circumstances outweigh mitigating circumstances.[187] The state is charged with proving "every fact necessary to constitute

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180. *See supra* text accompanying notes 50-58. *See also* Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 765 (1985).

181. Walton v. Arizona, 110 S. Ct. 3047 (1990).

182. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 438 (1981) (distinguishing capital penalty phase from ordinary sentencing).

183. See W. WHITE, THE DEATH PENALTY IN THE EIGHTIES—AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 51-112 (1987) for a description of the penalty phase.

184. Thompson v. Oklahoma, 487 U.S. 815, 856 (1988). See also Strickland v. Washington, 466 U.S. 668, 686-87 (1984) (citations omitted) where the Court stated, in the course of requiring effective assistance of counsel to ensure a fair "trial" in the penalty phase of a capital case: "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial . . . ." Although the Court has been viewed as moving away from the trial analogy in capital cases, see Weisberg, *supra* note 14 at 343-45 these recent cases still apply the analogy. The Court does seem to fluctuate, however. *See* Clemons v. Mississippi, 110 S. Ct. 1441 (1990).

185. *See In re* Winship, 397 U.S. 358 (1970).

186. *See supra* note 152.

187. *See supra* statutes discussed in notes 119-20 and 145.

the crime"[188] in a typical trial. By analogy, the state should have to prove every fact necessary to impose death as a punishment where the penalty phase operates as a trial to establish death or life as the appropriate penalty.

Moreover, the weighing of aggravating and mitigating circumstances in the penalty phase is a decision that needs a standard of proof. Although some of the lower courts, which rejected the beyond a reasonable doubt standard, distinguished between a "weighing" and a "factfinding" decision,[189] the label does not change the need for guidance on the amount of certitude in the decision.[190] In most states, the factfinder must decide if aggravating circumstances in fact outweigh mitigating circumstances[191] or if mitigating circumstances are sufficient to outweigh aggravating circumstances.[192] Death cannot be the penalty unless such a finding is made.[193] The factfinder is still faced with deciding to what degree he or she is convinced that aggravating circumstances outweigh mitigating circumstances or that mitigating circumstances outweigh aggravating circumstances.[194] Thus, a standard of proof is important to a "weighing" decision where the sentencer must make a determination that one fact (aggravating circumstances) outweighs another fact (mitigating circumstances).

Recognizing the need for a standard of proof in the penalty phase decision is only the threshold, however. The inquiry now becomes what the standard should be. This question is addressed in the next subsection.

2. *Beyond a Reasonable Doubt as the Appropriate Standard*

There is a compelling argument for a penalty decision "beyond a reasonable doubt" based on the reasoning of the Supreme Court's decisions in this area.

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188. *Winship*, 397 U.S. at 364.

189. *See supra* text accompanying notes 149-54.

190. See the excellent discussion by Judge Anderson, concurring in part and dissenting in part, in Ford v. Strickland, 696 F.2d 804, 879 n.6 (1983), where he states:

> [I]t is both possible and necessary to apply a standard of confidence to [the finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances] whether it is called a finding of fact or finding which involves a large measure of judgment or policy.

See also, Comment, *Capital Punishment and the Burden of Proof: The Sentencing Decision*, 17 CAL. W.L. REV. 316, 344-348 (1981) (discussion of situations other than a guilt determination where standards of proof are applied).

191. *See, e.g., supra* notes 119-20, 129, and 150 for statutes from Alabama, Arkansas, California, Indiana, New Jersey, New Mexico, Ohio, and Utah.

192. *See, e.g., supra* note 151 for statutes from Florida, Idaho, Illinois, Maryland, Mississippi, Missouri, and Oklahoma.

193. *See, e.g., supra* the statutes cited in notes 150-52.

194. There is some language in cases that would imply that, despite the instruction to determine if aggravating circumstances outweigh mitigating circumstances, jurors are free to impose life or death at will. This seems counterintuitive when the instruction specifically tells the factfinder the question it must answer. It may be a stronger argument in those states where the factfinder is told that, regardless of the finding, it may impose life. The variations, however, do not change the need for a standard of proof where the factfinder is told that death cannot be imposed unless the requisite finding is made. *See supra* notes 150-53 for discussion of statutory language.

If the factfinder's decision was truly open-ended, then perhaps there would be no need for a standard of proof. An open-ended procedure would simply give all the facts to the factfinder and instruct it to render a decision of life or death based on the factfinder's own reasoning. This may be procedure in Georgia, which does not utilize a "weighing" process. *See* Zant v. Stephens, 462 U.S. 862, 874 (1983). However, even then, the sentencer is deciding that death is appropriate and that decision should be rendered with a particular degree of certainty.

The Court addressed the risk of error and the symbolic effect of a standard of proof.[195] The classic risk of error analysis in a criminal case is comparing the "social disutility" of convicting an innocent person with acquitting a guilty one.[196] In a capital penalty phase, the risk of error would be between imposing an arbitrary or disproportionate death sentence and imposing an arbitrary or disproportionate life imprisonment sentence.[197] The symbolic effect is embodied in the need for certainty in order to give moral force to the decision. The question becomes whether society has confidence in the criminal justice system to impose death nonarbitrarily without a beyond a reasonable doubt standard. Although overlapping in many respects, each aspect, risk of error and symbolic effect, will be addressed.

The risk of an arbitrary life sentence is of minimal social disutility compared with the risk of an arbitrary death sentence. Unlike the risk of acquitting a guilty person, where society could be harmed by a dangerous person walking the streets, the risk of an inappropriate life sentence still incarcerates a defendant adjudged a danger to society. Similar to the great personal risk to an innocent defendant who is found guilty, the personal risk to a defendant unjustly sentenced to death is monumental. Moreover, the risk to a defendant unfairly sentenced to death is extraordinarily more severe than to an innocent defendant who is convicted since an executed death sentence is not reversible. Thus, the balance of risks would soundly place the penalty decision in the category of "beyond a reasonable doubt" decisions, such as those in the guilt phase of a criminal trial.

The reasoning of the Court's decisions heightening the standard to "clear and convincing" also supports a heightened standard in the penalty phase of a capital case. Conversely, the penalty phase is distinguishable from those decisions where the Court has found a "preponderance" standard sufficient. Certainly the loss of one's life is as highly valued as the loss of parental rights or loss of liberty due to an involuntary civil commitment where the Court has found a heightened standard necessary to satisfy due process.[198] Moreover, the loss of one's life is significantly more important than the issues where the Court has found a preponderance satisfied due process. A paternity action does not pit an individual against the state as does a capital sentencing, and further results only in a monetary obligation, not a loss of life.[199] The admissibility of evidence is peripheral to the major issues in a case, whether civil or criminal, unlike a death sentence which is treated as the final issue in a trial-type proceeding.[200] In

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195. *See supra* text accompanying notes 88-100.

196. *See supra* text accompanying notes 89-91 for a discussion of Justice Harlan's concurring opinion in *Winship*.

197. There is, of course, also the risk of executing an innocent person, an error that cannot be remedied. For a discussion of the extent of the risk of executing an innocent person and a discussion of the inadequacies of current death penalty schemes to minimize the risk, see point and counterpoint articles: Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Markman and Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Bedau and Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

198. *See supra* text accompanying notes 94-100.

199. *See supra* text accompanying notes 107-11.

200. *See supra* text accompanying notes 112-17.

addition, a sentence of death or life is distinguishable from a mandatory sentence for carrying a visible firearm, which merely results in a longer term of years, not a qualitatively different penalty such as death.[201] The significance of the risk to the criminal defendant in a capital penalty phase is staggering compared with the risks involved in the other issues where the court has found preponderance sufficient. A life or death decision is more similar, and even more severe, than the finality of a parental termination decision and the loss of liberty in a civil commitment.

The risk of error analysis overlaps with, but should not underestimate, the value of a high standard of proof as a symbol of the confidence of society in the decision. In *Winship*, the Court spoke of the need for a beyond a reasonable doubt standard to ensure the "moral force" of criminal law.[202] The same solemnity that attaches to the decision of guilt or innocence should apply to a decision whether a defendant lives or dies. The Court has repeatedly expressed its view that the death penalty decision is different and requires the utmost reliability.[203] As the Court stated in a case reaffirming the principle that all mitigating evidence must be considered, regardless whether the jurors were unanimous in finding a particular mitigating circumstance:[204]

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.[205]

The nature of the decision itself, life or death, thus speaks forcefully for using a heightened standard of beyond a reasonable doubt.[206]

The death penalty is unique. No decision has such finality. A due process analysis, based on the Court's cases on standards of proof, provides a compelling argument for a beyond a reasonable doubt standard. Such a heightened standard would reduce the risk of erroneous death verdicts and serve the symbolic role of representing society's concern for a just sentence.

Thus, despite the probable failure of an eighth amendment rationale to compel a beyond a reasonable doubt standard in the penalty phase, the due process clause of the fourteenth amendment provides a viable, independent the-

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201. *See supra* text accompanying notes 101-06.

202. *See supra* text accompanying note 93.

203. See, *e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring) (citations omitted), where Justice O'Connor stated:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. . . . Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction.

204. Mills v. Maryland, 486 U.S. 367, 383-84 (1988). Although the quoted language is stated in the context of an eighth amendment issue, the principle that death is different is also strong support for a standard of proof that reflects society's concern for accuracy in a due process sense. *See* Note, *The Bitter Fruit of* McGautha: Eddings v. Oklahoma *and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AMER. CR. L. REV. 63, 86 (1982) (nature of penalty calls for greater reliability under eighth and due process concepts).

205. *Mills*, 486 U.S. at 383-84.

206. *See* Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 367-71 (1984) (author argues for beyond a reasonable doubt standard based on the theory there should be a "presumption of life" in the penalty phase). *See also*, Weisberg, *supra* note 14 at 342 n.160 (comments on due process and eighth amendment theories for a beyond a reasonable doubt standard).

ory. Although many of the procedural protections in the penalty phase are based on the eighth amendment, the purpose of each amendment is unique. The eighth amendment assures a nonarbitrary sentence.[207] The due process clause assures fairness in the proceedings.[208] Due process fairness requires proof beyond a reasonable doubt in a criminal trial.[209] The Court has repeatedly analogized the penalty phase of a capital case to a trial.[210] Consequently, due process should require proof beyond a reasonable doubt in the penalty phase where the magnitude of the defendant's interest rivals or surpasses the defendant's interest at trial.

VII. CONCLUSION

The death penalty is far from being abolished in this country. There is constant litigation from every corner in capital cases and as a result, we now have a wealth of Supreme Court opinions from the last eighteen years. The Court's opinions on the death penalty have developed our knowledge of eighth amendment jurisprudence. It is now time to resurrect the full scope of fourteenth amendment due process rights that should apply in the penalty phase of capital cases. With the proliferation of cases and impending executions, it is especially time now to require that, if death is to be imposed, the sentencer be certain of that decision. Moreover, the certainty of a decision of death should be no less than the highest degree in our legal system, beyond a reasonable doubt.

207. *See supra* text accompanying notes 8-10.
208. *See In Re* Winship, 397 U.S. 358, 359-64 (1970).
209. *Id.*
210. *See supra* text accompanying notes 182-88.